SUPREME COURT OF KENTUCKY
2014-SC-000594-D
2011-CA-001771 & 2012-CA-001925

FURLONG DEVELOPMENT CO., LLC and
GORDON STACY — APPELLANTS

V.

ON APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT G. JOHNSON
CIVIL ACTION NO. 11-CI-00111

GEORGETOWN-SCOTT COUNTY PLANNING
AND ZONING COMMISSION,
EGT PROPERTIES, INC., AND
UNITED BANK & TRUST CO. — APPELLEES

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APPELLANTS' BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Appellants' Brief was served by first class mail, postage prepaid, on this the 8th day of October, 2015, to the following: Charlie Perkins 209 East Main Street Georgetown, KY 40324; Steven B. Loy and Monica H. Braun Stoll Keenon & Ogden 300 West Vine Street Suite 2100 Lexington, KY 40507; KY 40222; Clerk, Kentucky Court of Appeals 360 Democratic Drive, Frankfort, KY 40601; Hon. Robert G. Johnson, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, KY 40324.

Respectfully submitted,

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INTRODUCTION

This is a case that presents a novel issue about whether the Circuit Court erred when it granted the Defendants' Motion for Summary Judgment enforcing the Plaintiffs'/Developers' performance bond when the condition precedent for the triggering of the bonds had not been satisfied and without the the Plaintiffs being afforded discovery. Further, this Appeal presents an issue of whether the Court of Appeals could decide the issue on appeal based upon standing. Finally, this Appeal presents an issue about the viability of the Plaintiffs' claim for unjust enrichment and whether the Plaintiffs' Motion for Relief from Judgment pursuant to Civil Rule 60.02 should have been granted.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants believes that oral arguments will be helpful to the Supreme Court because of the intricacies of the subdivision development business and the novel issue presented concerning performance bonds being called without the bonds' condition precedent being satisfied.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellants, Furlong Development, LLC. and Gordon B. Stacy (hereinafter referred to as "Furlong" or "Stacy") were the Plaintiffs in the trial court action. Furlong started out as a father and son operation, but Gordon Stacy's father passed away and was not a party to these proceedings. Furlong had purchased 26 acres of property in Georgetown, Scott County, Kentucky, for the purpose of subdividing the land into 90 single-family units. The subdivision was generally known as The Enclave. (Record on Appeal [hereinafter ROA] at 8, 31). In order to finance the purchase and improvements of the Enclave, Furlong borrowed money from United Bank & Trust Company (as the successor in interest to Farmer's Bank, the former name of the Bank). In order for the loan to be obtained by Furlong, Stacy had to personally guarantee the funds borrowed by his company, Furlong.

The Georgetown-Scott County Planning and Zoning Commission (hereinafter referred to as "Planning and Zoning" or "Commission") required Furlong to provide bonding in an amount equal to 125% of the estimated cost of sidewalks, a final layer of asphalt on the streets and storm drain cleanup before Furlong could record the plat in the County Clerk's office. (ROA at 8). There were three separate bonds purchased by Furlong for this purpose in the total amount of $148,287.50 from the bonding company, Platte River Insurance Company (hereinafter Platte River). (ROA at 14, 16, 18) Platte River also required Stacy to personally guarantee the bond amount. (ROA at 8-9).

At the time that Furlong purchased the unimproved land, the economy was in good condition. The land was next to a golf course and in a prime location near Lexington, Frankfort and Georgetown, Kentucky. Furlong and its subcontractors built all

parts of the preliminary infrastructure in accordance with the approved plans. However, the final layer of asphalt was not to be constructed until after 80% of the lots had been sold and houses constructed thereon. (ROA at 332-3). The purpose of this 80% requirement is simple and straightforward. Since it is foreseeable and highly likely that there would be a number of heavy construction machines and materials needed to construct houses, Planning and Zoning did not want dedicated streets to be damaged by tracks from heavy equipment and trucks. This is also true for the sidewalks and the final storm drainage cleanout. It would be foolish to have nice, new sidewalks dedicated to the County that had become torn up and damaged by such work. The storm cleanup requirement is also common sense because of all the silt, dirt and debris created by home construction that would flow into the Enclave's drains. The Planning and Zoning's own Subdivision and Development Regulations state:

> The developer and/or his contractor shall build temporary access roads to designated specific routes to accommodate project traffic during construction. This shall be accomplished after approval of the preliminary plat and designated in the field with signage prior to the approval of the final plat to the provisions of Article IX. Any damage to existing paved roads due to subsequent construction activities shall be restored or repaired to the existing road standard prior to damage. See Article VI (construction of improvements for bonding requirements for phased development…Any proposed roadway to be dedicated to the City of Georgetown for the maintenance **can apply final inch of asphalt surface after 80 percent of the lots that are served by the roadway has received Certificate of Occupancy.**

(ROA at 332-3 emphasis added). In other words, Planning and Zoning quite naturally wanted 72 houses (80% of 90 units) built before this finishing work was performed.

After developing the property to the point where houses could be built, Furlong attempted to sell individual parcels. However, in late 2007 to 2008, the real estate bubble

burst and Furlong could not give away parcels. The Bank refused to loan any more money to Furlong. Furlong attempted to find financing elsewhere, but since it was during one of the most major economic downturns since the Great Depression, Furlong was not able to obtain alternative financing. (ROA at 9).

Because lots could not be sold, Furlong could not establish a revenue stream and got behind on the loan payments to the Bank. Subsequently, the Bank approached Furlong and advised it would foreclose on the property unless Furlong agreed to a deed in lieu of foreclosure. However, instead of deeding the property back to the Bank, the Bank required that Furlong deed the property to EGT Properties, Inc. (hereinafter EGT) on April 1, 2008. (ROA at 9, 24-32). In exchange for the Bank's forbearance on pursuing foreclosure and a deficiency judgment, Furlong transferred the property to apparently the Bank's wholly owned subsidiary, EGT. (ROA at 9, 24). It is important to emphasize that it was the Bank that directed Furlong to deed the property to EGT. (ROA at 25 on page two of Deed between Furlong and EGT). The deed transferred all interests and claims of Furlong in the property to EGT. However, the deed did not release Furlong from any liabilities to third parties. (ROA at 27). The subdivision was later transferred to another company owned by the Bank, EKT Properties, Inc. for $4,000,000.00 and it began to further develop the property. (ROA at 335).

At the same time of the property transfer, Furlong and the Bank entered into a Mutual Release, which stated:

> The Obligated Parties and Lender, each hereby for itself and its parents, subsidiaries, designees, affiliates, joint venturers, agents, partners, companies, sureties, heirs, successors, assigns, officers, directors, shareholders, members and any person acting on their behalf shall be deemed to have forever released, remised, discharged and acquitted the other, and its guarantors, parents, subsidiaries, designees, affiliates, joint

> venturers, agents, partners, companies, sureties, heirs, successors, assigns, officers, directors, shareholders, members and any other person acting on its behalf, from any and all suits, claims, costs, liabilities, damages, actions, bonds, expenses, accidents, injuries, attorneys' fees and any other claim or cause of action of every type or nature, whether now existing, whether known and unknown, whether liquidated or liquidated, whether matured or unmatured, whether contingent or actual and whether it be for damages of any kind whether general, special or punitive in any action at law or equity that the releasing party may have or claim to have, arising out of, by reason of, in connection with, or in any way related to the Loan Documents and the Loans, except that the Obligated Parties are not released from any representation or warranty set forth in the Deeds and the Obligated Parties and Lender are not released from any covenant herein.

(ROA at 33-36).

Despite the deed and the mutual release, the Bank, through its counsel, made an affirmative request to Planning and Zoning that it call the bonds. An August 1, 2008, letter written by the bank's attorneys to Planning and Zoning stated:

> We are writing on behalf of Farmers Bank and Trust Company concerning Subdivision Bonds filed by Furlong Development Company, LLC with respect to public improvement in the Enclave Subdivision Units 1, 2, and 3. The bank acquired this property by deed in lieu of foreclosure and has determined that the public improvements secured by these bonds have not been completed. Our proposal is that the proceeds of the bonds be placed in an escrow account and, as the work is completed and inspected by the City of Georgetown, the funds be released to the bank as reimbursement for construction and completion of the improvements.

(ROA at 37). About two weeks later, Planning and Zoning, through its attorney, demanded that the bonding company, Platte River, pay the bond money immediately by stating that Furlong had "abandoned" the project. (ROA at 38-9).

Some time passed before Platte River made a definitive response to the Bank/Planning and Zoning demand for the money of the three bonds. Counsel for Platte River had discussed the matter with Benjamin Krebs, P.E., the engineer for Planning and Zoning, who stated that the last one-inch of street asphalt, sidewalks and other

improvements covered by the bonds were not to be installed or performed "until 80% of the units planned for the subdivision have been constructed. The present state of the Enclave is that no units have been constructed. In other words, the bonded obligations have not been triggered." (ROA at 46-7 at February 5, 2010 letter from Platte River Counsel).

In order to determine Furlong's rights in the case at bar, Furlong and Stacy filed a Complaint in Scott Circuit Court on February 2, 2011, asking the Court to declare its rights under the bonds; whether the Bank had breached the mutual release when it demanded that the bonds be called; whether the Bank and EGT would be unjustly enriched by the windfall of the bond money; whether the deed in lieu of foreclosure terminated the bonds; and whether Planning and Zoning acted outside its authority by calling the bonds before 80% of the houses had been built in the Enclave. (ROA at 5-49).

Within only a couple of months after the last responsive pleadings to the Complaint were filed by the respective parties, Motions for Summary Judgment were filed by Planning and Zoning, the Bank and EGT. (ROA at 86, 229). This was also before the Plaintiffs had an opportunity to bring in another party defendant, namely EKT Properties, even though the trial court had granted leave for them to do so. (ROA at 351). However, about two weeks before the filing of the Motions for Summary Judgment, Platte River served Interrogatories and Requests for Production of Documents upon the other Defendants. The Interrogatories and Requests asked for the following: Any offers, bids, solicitations or any other means by which the Bank or EGT had marketed the property; any offers, bids or proposals by the Bank and EGT to develop the Enclave; any documents dealing with the Bank's, EGT's or anyone's development of the property; any

applications to the Planning and Zoning by the Bank or EGT to develop the property; any photographs of the proposed subdivision; documentation concerning Planning and Zoning internal and external communications concerning the Enclave; minutes from any meeting of Planning and Zoning that discussed the Enclave; copies of any policies, procedures or rules concerning approval of application to build subdivisions or that controls the course of any construction of subdivisions. (ROA at 257-266).

Instead of responding to these requests, Planning and Zoning and the Bank filed motions for a protective order so they would not have to produce the requested discovery. These Defendants argued that since the trial court was to hear their Motions for Summary Judgment shortly after the discovery responses were due, the Court should stay discovery to see if the pending motions would resolve the entire case. (ROA at 251). The trial court accepted this argument. Therefore, the trial court heard the Motions for Summary Judgment without the benefit of any discovery. (ROA at 351 and Appendix at E). After hearing oral arguments, the Defendants' Motions for Summary Judgment were granted enforcing the bonds and resolving the case on August 29, 2011. (ROA at 365 and Appendix at C).

In the Order granting Summary Judgment the trial court made the finding that all the parties appeared to agree that Furlong defaulted on its loans to the Bank and entered into a deed in lieu of foreclosure. The trial court also found that there was a dispute as to the amount of work Furlong had done on the Enclave. However, by focusing on the money borrowed from the Bank by Furlong, the trial court determined that a good deal of work at the Enclave had been performed. It further found that it was not yet time for the "finishing touches on the subdivision, which is basically what the bonds were for."

Moreover, the trial court stated "[q]uite frankly, the Court has reviewed the case law provided by each of the parties and finds it unnecessary to further expand upon their arguments." (ROA at 368 and App. at C). The trial court found the arguments of the Plaintiff irrelevant and the arguments of Platte River "preposterous" because a great deal of work had been done by Furlong and because Platte River "presumes that a developer builds the houses in a development before he builds the infrastructure." (ROA at 365-368 and Appendix at C). Therefore, Summary Judgment was granted and no further discovery was allowed. Furlong and Stacy filed a timely Notice of Appeal related to the Summary Judgment.

Within one year of the Summary Judgment being entered by the trial court, the Appellants filed a Motion for Relief from the Final Judgment entered August 29, 2011. (SROA at 3).[1] This Motion was based on CR 60.02, which allows a party to have relief from a final judgment because of newly discovered evidence. The substance of the Motion was based on two affidavits. The first affidavit was from an individual named David Thornton. He is the owner of Greater Lexington Insurance and he was the insurance professional that brokered the three performance bonds in issue. (SROA at 10-12).

Based on Mr. Thornton's memory and notes taken during discussions he had with the parties in 2008, he recalled speaking to Benjamin Krebs P.E., engineer for the Georgetown Scott County Planning and Zoning Commission. Mr. Krebs stated to Mr. Thornton that the performance bonds should have been released after the transfer of the

[1] The Record on Appeal dealing with the Appellants' 60.02 Motion is from Case #2012-CA-001925 and is subsequent to the first record dealing with the initial appeal of Case # 2011-CA-001771 and therefore will be designated as SROA for Subsequent Record on Appeal for citation purposes.

development from the Appellants to the Bank's company EGT Properties. However, Mr. Krebs stated that the bonds should not be released until other surety was in place in order to protect Scott County.

Following up on his conversation with Mr. Krebs, Mr. Thornton then discussed the issue of the bonds with the Bank's loan officer, Michael Easley, who was involved in the transactions with the Appellants. Mr. Thornton advised that since the Bank, through the Bank's company, now owned the development, the Bank would be required to place new security for the performance of the finishing work referenced above. During the initial conversations, Mr. Easley agreed with him. They had many discussions thereafter about the types of security that would be acceptable, including a letter of credit from the Bank. However, in September 2008, Mr. Easley advised that the Bank was not going to secure the finishing work on the development, but would instead encourage the Planning and Zoning to call the original bonds. (SROA 10-12).

The Appellant, Gordon Stacy, also filed an affidavit in support of the Motion for Relief from the Judgment. Mr. Stacy stated that he ran into David Thornton on July 24, 2012, and Mr. Thornton advised him of his conversations with representatives for Planning and Zoning and United Bank. Mr. Stacy further stated that he did not know about Mr. Thornton's conversations with the Defendants and that he had no reason to believe that Mr. Thornton would speak or have cause to speak to these individuals at the time the underlying case was pending in the Circuit Court. (SROA 13-14).

After conducting a brief hearing on the matter, the Circuit Court denied the Appellant's Motion for Relief from the Summary Judgment. (SROA 29-30, App. at D).

Therefore, the Appellants filed a second appeal from the Order denying said motion entered on October 5, 2012.

Furlong and Stacy moved the Court of Appeals to consolidate the two appeals, which was granted. On March 14, 2014, the Court of Appeals rendered a split decision affirming the trial court's Summary Judgment and its subsequent denial of the Plaintiffs' 60.02 Motion. As will be argued below, the Court of Appeals based much of its determination on its own assumptions concerning the private agreement between Platte River and Furlong. According to the written indemnity agreement between Platte River and the Appellants, Platte River had the contractual sole right to prosecute litigation concerning the bonds. The Court of Appeals determined on its own that Platte River did not have an abiding interest in the appeal.

Subsequently, Platte River moved the Court of Appeals to be placed on the court's docket in order to file a Petition for Rehearing of the March 14, 2014 Opinion. Platte River also filed a proposed Petition for Rehearing with the motion. (Motion for Leave to File and to Amend Docket filed on April 17, 2014). However, the Petition was returned to Platte River without being filed after Platte River's Motion to be placed on the docket was denied. (Order of Court of Appeals entered on July 9, 2014 and at Step #62 in the first appeal and #32 in second appeal). However, Furlong and Stacy's Petition for Rehearing was filed and did advise the Court of Appeals that Furlong, Stacy and Platte River had an agreement where Stacy and Furlong were to spearhead the appeal in order to keep attorney fees low because there was an indemnity agreement between Furlong and Platte River for the reimbursement of attorney fees and costs. (Appellants' Petition for Rehearing filed on April 2, 2014 at Step #56). However, the Appellants'

Petition for Rehearing was denied by split decision. (Order Denying Petition for Rehearing entered on September 2, 2014 at Step #65 and App. at B).

ARGUMENT

I. THE PERFORMANCE BONDS SHOULD NOT HAVE BEEN CALLED BY PLANNING AND ZONING

This issue is preserved for review through the Motions for and Responses to the Motions Summary Judgment by each respective party and the trial court's subsequent granting of Summary Judgment. (ROA at 365). The standard of review of whether a trial court properly granted Summary Judgment is de novo and that Summary Judgment is improper unless it would be impossible for the respondent to produce evidence at trial to warrant a judgment in his favor and against the movant. See Steelvest v. Scansteel, 807 S.W.2d 476 (1991).

This issue can be separated into three questions for the Court. First, was there an implied condition in the bonds that needed to be satisfied before Planning and Zoning could demand payment under the three performance bonds in question? Second, was Planning and Zoning damaged in any way by the Appellants transfer of the property to another company, EGT? Third, did the transfer to EGT (or any new developer) require the new owner of the Enclave to secure its own bond for the benefit of Planning & Zoning?

A. THERE WAS AN IMPLIED CONDITION OF 80% OF THE HOMES ON THE ECLAVE TO BE BUILT BEFORE WORK COVERED BY THE BONDS WAS TO BE PERFORMED

In relation to performance bonds, Kentucky law has long established that the bonds are to be understood in accordance with the underlying contract for performance or

the underlying statute or regulations that required the bond in the first place. As held in ABCO BRAMER, Inc. v Markel Insurance Co., 55 S.W.3d 841 (Ky. App. 2000):

> With regard to performance bonds, it has been held that if the contract is incorporated into the bond, the bond and the underlying contract should be read together to determine the intention of the parties as to what and who is covered under the bond. Royal Indemnity Co. v. International Time Recording Co. of New York, 255 Ky. 823, 75 S.W.2d 527 (1934); Federal Union Surety Co. v. Commonwealth, 139 Ky. 92, 129 S.W. 335 (1910); Blair & Franse Const. Co. v. Allen, 251 Ky. 366, 65 S.W.2d 78 (1933).

Id. at 844 (citations from original) In Commonwealth v. Ginn, 63 S.W. 467, 469 (Ky. 1901), the Court held that a bond should be read in light of the statutory requirements referenced in the bond. In Ginn, the bond referenced the statutes dealing with the sale of schoolbooks, and therefore, the bond was interpreted in light of those statutes. See Id.

In the case at bar, the bonding documents all stated that the bonds were "required pursuant to the subdivision regulations of Georgetown-Scott County Planning Commission." (ROA at 14, 16, and 18). The bonds also stated specifically what type of work was to be covered by the bonds. As stated above, there were three bonds and each bond covered a portion of the Enclave. The specific purpose of each bond was for the building of sidewalks, applying the final inch of asphalt to the streets, and to cleanup the storm drainage system at the end of the project after 80% of the homes were built in the Enclave.

The Planning and Zoning's Subdivision and Development Regulations state:

> The developer and/or his contractor shall build temporary access roads to designated specific routes to accommodate project traffic during construction. This shall be accomplished after approval of the preliminary plat and designated in the field with signage prior to the approval of the final plat to the provisions of Article IX. Any damage to existing paved roads due to subsequent construction activities shall be restored or repaired to the existing road standard prior to damage. See Article VI (construction of improvements for bonding requirements for phased

> development...Any proposed roadway to be dedicated to the City of Georgetown for the maintenance **can apply final inch of asphalt surface after 80 percent of the lots that are served by the roadway has received Certificate of Occupancy.**

(ROA at 332-3 emphasis added). The purpose of this 80% rule is that at least 72 of the planned 90 houses would be built before this finishing work was performed by the Developer. It is without doubt that there would be a number of heavy construction machinery driving over the streets and heavy trucks hauling materials needed to construct each and every house. Planning and Zoning did not want streets dedicated to the count or city to be damaged by tracks from heavy equipment and trucks. This is also true for the sidewalks and final storm drainage cleanout. The storm clean up requirement is also common sense because of all the silt, dirt and debris created by home construction that would flow into the Enclave's storm drains. For purposes of the Appellants' argument, it is important to note that the work covered by the bonds was very specific.

Although the limited record of the trial court in this matter has constrained argument, there is enough in the record to show that the work covered by the bonds was not required at the time Summary Judgment was entered by the trial court. No lots were ever sold in the Enclave and no houses ever built. Therefore, no Certificates of Occupancy were ever issued. (ROA at 284). Moreover, no heavy machinery ever went back and forth over streets or tracked over sidewalks. Further, neither silt nor debris from construction ever went into the storm drains. This was the condition precedent that needed to be satisfied before the bonds were triggered. The bonds simply had not matured to the point where they could be enforced.

There does not appear to be any Kentucky case law that is directly on point. The main case that supports Appellants' argument is the Federal case of Westchester Fire

Insurance Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla 2010). The facts of the Westchester case are somewhat convoluted, but the issue of law decided by that court is highly relevant to the Appellants' argument. The developer in Westchester had planned a five-phase subdivision. For Phase II of the subdivision, the city required a bond to cover the sewer, water and drain lines to service the homes in this phase. The developer was also required to bond the general earth moving work and roadways. The purpose of the Westchester bonds were to ensure that the homeowners would have access to utilities. See Id. at 1299-1300. The developer had cleared land and moved some trees in Phase II, but then filed for bankruptcy. A new developer interested in taking over the subdivision development made an offer to take over the subdivision if the city would foreclose upon the bonds.

As in the case at bar, the Westchester court noted that the development started in the heyday of the real estate bubble that eventually burst in the middle of the last decade. See Id. at 1304. No houses were ever built in the subdivision in Westchester. In its analysis of the case that Court held:

> If the surety posts a bond in accord with an ordinance, the obligations of the surety must conform to the purpose and obligations imposed by the ordinance. See Glades County, Fla. v. Detroit Fidelity & Sur. Co., 57 F.2d 449, 451 (5th Cir.1932) (applying Florida law). Although, as the City argues, the literal terms of the bond impose no condition (other than Levitt's [original developer] default) on Westchester's obligation to pay, the bonds and the ordinance construed together impose a condition that construction of the development proceed before the City may collect.

Id. at 1305. In support of this point of law, the Westchester Court cited to the New Jersey Supreme Court case of Riverdale Planning Bd. v. E&R Office Interiors, Inc., 575 A.2d 55 (N.J. Super. App 1990). The Westchester Court finally held that "the City

ordinance requires the bonds to ensure that no resident purchases a home without access to the City's utility services. Because no home has been built that requires the City's utility service and because no home will be built for at least several years, the implied condition fails." Id. at 1306.

The Enclave had neither homes built nor lots sold. The purpose of the bonds in question was to protect taxpayers from repairing roads, sidewalks and storm drains that were damaged by anticipated and numerous construction sites for homes. As stated above, these bonds were very specific the type of work that was secured. The bonds do not cover the construction of roadways, but only the final inch of asphalt on dedicated streets. The bonds do not cover the construction of storm drains, but only the repair and cleaning. The bonds are intended to cover the construction of sidewalks, but without homes or lots sold, the sidewalks would pointlessly traverse a field.

The Westchester Court is not alone in reading the bonding documents in light of the ordinances that required the bond in the first place. In County of Yuba v. Central Valley Bank, 20 Cal. App. 109 (1971), the developer was to build a subdivision for people at a local Air Force base to live. However, there was an unanticipated reduction in personnel at the base and it was determined that a subdivision was no longer appropriate. The bonds in Yuba were to cover the successful completion of the streets, but since construction never began on the subdivision, there would be no purpose served by allowing the city to recover under the bonds. Construction of the basic infrastructure had began in the case at bar, and the Yuba case would support the Appellee's position that Furlong's bond should be forfeited if not for the 80% rule that is implied in the bonds reference to the subdivision regulations. It was contemplated by the parties that 72 lots

be sold and have home constructed upon them before work secured by Furlong's bond would be triggered. There is no such requirement in the Yuba case. Therefore, the bonds in the case at bar had not matured and should have not been called by the Planning and Zoning Commission.

B. THE PLANNING AND ZONING COMMISSION HAS NOT SUFFERED DAMAGES

This argument, too, begins with the District Court's analysis in Westchester Fire Insurance Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla 2010). As discussed above, the purpose of the bonds in question was to protect future homeowners against torn up streets and sidewalks along with clogged-up storm drains after construction of at least 72 homes in the subdivision. It is uncontroverted that no one had purchased a single lot in the Enclave or even remotely began construction of a home.

The measure of damages in relation to a performance bond is the amount actually and reasonably expended on completing the work covered under the bond, with the maximum amount of damages being the bond amount. See Id. at 1307. In the case at bar, it is not that a damage amount to the Planning and Zoning cannot be reasonably estimated should the anticipated repairs not be performed and sidewalks not be constructed after construction of 72 homes, it is that there were no trucks, tractors and construction workers causing the damage contemplated by the 80% rule of the bonds. The purpose of the bonds was so that the taxpayers of Scott County would not have to shoulder the burden of paying to repair streets, replace damaged sidewalks and clean out construction debris from storm drains. The anticipated construction of homes never took place. This begs the question of what amount did or what amount would Scott County incur? The answer is zero. The need for repairs had simply not arisen. Awarding the

bond amounts, under these circumstances, is simply awarding a cash windfall of approximately $150,000.00 to Scott County and Georgetown and is an unreasonable forfeiture. See Id. at 1307. In this situation, the appellants would also urge the court to invoke the doctrine of economic waste. In Swiss Oil Co. v. Riggsby, 67 S.W.2d 30, 33 (Ky. 1933), the Court held [i]n cases in which the performance is possible only at the expense which is ruinous to one party and of little or no benefit to the other, the parties should not be forced into such economic waste under penalty of an action to recover damages." Id. There is no present benefit to Scott County, but the payment of the bonds will ultimately be shouldered Furlong and Stacy.

C. ANY NEW DEVELOPER IS REQUIRED TO BOND THE SUBDIVISION

As set forth in the Statement of Facts above, Furlong was unable to sell any lots of the Enclave after the real estate bubble burst. Furlong entered into a deed with EGT that was entitled a "deed in lieu of foreclosure". However, this deed was not to the Bank, the lender and holder of the mortgage, but was to a separate company, EGT. The deed between Furlong and EGT contained a provision that Furlong transfer the property to EGT subject to the Security Documents. (ROA at 25). Security Documents is defined by the deed as "the Mortgage, the Guaranty and the Financing Statements are hereby collectively referred to as the "Security Document." (ROA at 25). It appears from the deed that the mortgage was still attached to the property even though it was transferred to a third party. A mortgage is a lien on the property to secure a debt. It is clear from the Mutual Release signed by the Bank and Furlong that the Bank was releasing Furlong and Stacy from the outstanding loan amount. (ROA at 33). Therefore, why was the mortgage still left attached to the property? Without being able to use discovery (as was disallowed

by the trial court) to determine why the Bank chose this avenue, we are left with assumptions.

As argued to the Court of Appeals, Furlong entered into an arms-length transaction with a third party, EGT. EGT took the property subject to the mortgage. Furlong did not abandon the property as was argued by Planning and Zoning when it called the bonds. "Abandonment" is a legal term defined by Black's Law Dictionary. In relation to abandonment of property, Black's Law Dictionary states:

> Abandoned property in a legal sense is that to which an owner has relinquished all right, title, claim and possession, **but without vesting it in any other person**, and with intention of not reclaiming it or resuming its ownership, possession or enjoyment in the future.

Black's Law Diction, Centennial Edition (1991) at page 2 (emphasis added). This is not a case where Furlong simply walked away from the project and gave the property back to the lender. Furlong transferred the property subject to the mortgage to another third party, EGT. The Court of Appeals designated EGT as a real estate holding company for the Bank, but the deed relied upon by the Court of Appeals does not show that this is the case. (Opinion at p. 3). This was a deed for consideration because apparently the third party, EGT, would still retain the bank's priority against any other liens filed, including the mechanic's lien mentioned in the deed. This, in itself, is consideration received by EGT and not the bank that actually loaned the money to Furlong. However, we are really unable to figure this out with any certainty because as will be argued below the Plaintiffs (and Platte River) were denied time to perform discovery.

Moreover, when Furlong responded to the Motions for Summary Judgment filed by the Bank and the Commission, it showed that EGT properties had sold the subject property to EKT Properties for $4,000,000.00 on September 29, 2008. (ROA at 335).

Furthermore, Furlong attached pictures of work being performed on the subdivision after Furlong had transferred the property. (ROA at 345-48). This raised the issue of whether a new developer had taken over the project and therefore would have extinguished the bonds in issue by requiring the new developer to post its own bonds for the work to be performed after 80% of the planned homes had received Certificates of Occupancy.

KRS 100.281(4) states that subdivision regulations promulgated by commission shall require good surety to ensure proper completion of the physical improvements. The regulations for the Georgetown Planning and Zoning Commission specifically state "the developer must file with the Planning Commission proof of bond or a letter of credit upon a bank or other appropriate financial institution conditioned to secure the construction of said improvements." (ROA at 315; Article VI 600-B). Both the statutory scheme and the subject regulations strictly require a bond from any developer.

The record that was before the trial court showed that the property had been transferred from Furlong to EGT and then to EKT for $4,000,000.00. It also showed that EKT (or EGT) was not simply a holding company, but was performing work on the subdivision. The question then becomes whether this new "developer" was required to post its own bonds for the finishing work because it would be the developer selling the lots for a profit. Since the bonds were to cover repairs and construction of sidewalks after the selling of lots, this new developer should post its own bonds, and thereby extinguish the bonds of Furlong. This is a doubt that should have been resolved in favor of Furlong, and therefore preclude summary judgment. There is also clearly a dispute as to the conclusion of whether EGT or EKT should have been required to post its own bonds under the facts of the case and the subject subdivision regulations.

II. UNJUST ENRICHMENT IS A VIABLE CAUSE OF ACTION AGAINST THE BANK

This issue is preserved for review through the Motions for and Responses to the Motions for Summary Judgment by each respective party and the trial court's subsequent granting of Summary Judgment. (ROA at 365). The standard of review of whether a trial court properly granted Summary Judgment is de novo and that Summary Judgment is improper unless it would be impossible for the respondent to produce evidence at trial to warrant a judgment in his favor and against the movant. See Steelvest v. Scansteel, 807 S.W.2d 476 (1991). Moreover, the Supreme Court reinforced this standard in Welch v. American Publishing, 3 S.W.3d 724 (Ky. 1999) when it held "trial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the records **after discovery has been completed** to determine whether a trier of fact could find a verdict for the non-moving party." Id. at 729-30 (emphasis added).

As set forth in the dissent in the case at bar, the majority of the Court of Appeals did not address the effect of the mutual release upon Furlong's and Stacy's claim for unjust enrichment against the Bank and EGT or EKT. (Opinion at 14-17). As set forth in the Statement of Facts above, the mutual release was entered into at the same time as the deed transferring the subdivision to EGT. The release language is clear that the Bank had induced Furlong to transfer the property by agreeing to release Furlong and its sureties for the bonds. (ROA at 33 and Opinion at 15). However, four months after this release was entered into by the parties, the Bank, through its attorney, affirmatively requested that the Commission call the bonds and proposed that "the proceeds of the bonds be placed in an escrow account and, as the work is completed and inspected by the City of Georgetown, the funds be released to the bank as reimbursement for construction

and completion of the improvements." (ROA at 302). This was in direct violation of the release that was signed by Bank. It had released Furlong and its surety (Platte River) from any claims the Bank might make on the bonds. However, the Bank clearly wanted to use the bond money to reimburse itself for the finishing work. It is disingenuous for the Bank to argue that it was not attempting to recover at least $148,000.00 worth of money that ultimately would be the responsibility of Furlong and Stacy to pay.

In Kentucky, to prevail under a theory of unjust enrichment, a party must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. Jones v. Sparks, 297 SW.3d 73, 78 (Ky. App. 2009). In the Opinion of the Court of Appeals, the majority asserts that the unjust enrichment claim was merely conclusory and failed to sustain the burden of proving their case. (Opinion at 12) To some extent, this is true because the Appellants did not have an opportunity to flesh out their claim through discovery as will be argued below. However, the majority also held that the unjust enrichment is not viable when an express contract between the parties define the circumstances under which an obligation may arise. (Opinion at 12) The majority then focused on only the so-called deed in lieu of foreclosure and concluded that the Bank would not be responsible for obligations to third parties. (Opinion at 12). The majority also determined that the surety bonds inured to the benefit of the planning commission alone, regardless of the Bank's request that the bond money be paid to it.

When looking at the elements of an unjust enrichment claim, the Plaintiffs in the trial court had established enough facts to preclude summary judgment on this claim. First, the Bank and its company intended to be benefited by encouraging the Commission

to call the bonds that had not yet matured. It clearly requested that bonds be held by the commission in escrow so that it could be paid the bond money at a future date. How this could not be considered a breach of the release entered into by the parties as determined by the majority is hard to justify or comprehend. The Bank on the one hand promises to release Furlong, Stacy and its sureties, but then on the other hand requests that the money be held for its benefit. This is clearly a breach of the mutual release. The holding of the majority that the express contract controls whether a person has a claim for unjust enrichment actually supports the argument for an unjust enrichment claim. Hiding behind the Planning and Zoning Commission's willingness to call a bond that had not yet matured is no defense.

By encouraging the Commission to call the bonds in question, the Bank was benefited in many ways. First, the Bank or its company, EGT, would not have to post its own bond in accordance with the Commission regulations. Therefore, neither would have to pay the premiums required on bonds. Secondly, after releasing Furlong and its sureties on the bonds, it could then turn around and get the bond money from the Commission as reimbursement for work that was not even required to be performed at the time the bonds were called because no houses had been built. It was also alleged before the trial court that EKT was contacting large developers in the area in order to sell the property to these developers. (ROA at 336). It sure would have been a nice selling point to any new developer, that the Bank or whomever would give this new developer about $150,000.00 to do the finishing and repair after it sold lots for profit, especially when the Enclave itself had already been developed to the point where a new developer could sell lots for a profit. It is standard practice in subdivision development that money to pay for

the finishing work would be paid from the monies received by the developer form the sale of the lots. The sole purpose of the bonds in question is to cover this work when a developer sells lots and then abandons its duty to pay for the repair and finishing work. This is clearly an inequitable retention of a benefit by the Bank and EGT that in the end would be a crushing burden shouldered by Furlong and Stacy to pay.

As stated by the dissent, the purpose of a release for consideration is to avoid unjust enrichment. (Opinion at 15). No matter how the issue is looked at, the money of the bonds would eventually be paid to the Bank or the company that the bank sold the property to for development. All of this is clearly in contradiction to the release entered into by the bank. Therefore Summary Judgment should not have been granted in the trial court and the Court of Appeals should not have affirmed the trial court.

III. STANDING OF FURLONG AND STACY WAS NOT A PROPER GROUND TO DETERMINE THE OUTCOME OF THE APPEAL

The standing issue was first raised by the Bank and EGT in defense to Furlong's and Stacy's appeal argument that it should have been allowed to perform discovery before the entry of Summary Judgment by the trial court. (Brief of Bank-Appellees at p. 16). The defense of standing was not raised in the trial court by the Bank, EGT or the Commission as an affirmative defense. (ROA at 54-58, 59-65). However, it appears that much of the Opinion of the majority of the Court of Appeals was based Furlong's and Stacy's lack of standing to bring the claims of a declaratory judgment and unjust enrichment. The standard of review of whether the Court of Appeals can decide a case on standing appears to be mainly a legal issue that is reviewed de novo. See Harrison v. Leach 323 S.W.3d 702 (Ky. 2010).

The Court of Appeals determined as:

> an initial matter, we note that Furlong and Stacy declared expressly in the parties' indemnity agreement that Platte River would have the exclusive right to decide, and determine whether any claim, demand, suit or judgment upon the Bond(s) shall be paid, settled, defended or appealed, and its determination shall be final, conclusive and binding." Pursuant to the parties' agreement, the sole exception to this provision would apply only if Furlong and/or Stacy deposited with Platte River cash or collateral sufficient to satisfy the surety. Nothing in the record indicates that Furlong or Stacy ever complied with Platte River's written demand to post the required cash or collateral. Thus, the decision of Furlong and Stacy to commence a declaratory judgment action appears to have violated the express terms of the parties' agreement.

(Opinion at 10). The Court of Appeals found that the demand for indemnity was binding upon Furlong and Stacy and "they are not entitled to prosecute an appeal on behalf of Platte River." Id. The Court of Appeals determined that Platte River had no interest in pursuing an appeal and concluded that Platte River did not intend to prosecute an appeal of the judgment in favor of the planning Commission. Id. The Court of Appeals extended this reasoning to Furlong's unjust enrichment claim against the Bank and EGT and held "this issue is contingent upon Platte River's interest in this appeal, which alone appears to have standing to assert it." (Opinion at 11).

It is clear that the Court of Appeals based its ruling on an assumption that Platte River did not want to pursue an appeal and that Furlong and Stacy did not have standing to prosecute the appeal. After reviewing the Opinion of the Court of Appeals, Platte River attempted to file a Petition for Rehearing to correct the Court of Appeals assumption that it had no interest in the appeal. It filed its Petition on April 1, 2014, but was advised by the clerk that it did not appear to be a party to the appeal because the amended notice of appeal naming Platte River as co-appellant was not on the court's

docket. Therefore, Platte River filed a motion to be placed on the Court's docket so that it could advise the Court of Appeals that it had an interest in the Appeal. (Motion for Leave to File by Platte River at Step #57 in 11-CA-001771). This Motion was denied by the Court of Appeals and the Petition for Rehearing was never filed with the Court of Appeals. (Order entered July 9, 2014 at Step #62 in 11-CA-001771).

However, Furlong and Stacy did file a timely Petition for Rehearing and specifically stated that Platte River had a private agreement, separate and above from the written indemnity agreement in the trial court record, that Furlong and Stacy would spearhead the appeal to present the substance of the issues while also keeping attorney fees at a minimum due to the indemnity provision between the parties. It also advised that the federal action between Platte River and Furlong had been stayed by agreement while this case made its way through the Kentucky Courts. (Petition for Rehearing filed April 2, 2014 at Step #55). The Appellants also raised the issue of standing in its Petition as the other reason why the case should be reheard. However, Furlong's Petition for Rehearing was denied by the majority of the Court of Appeals. (Order denying Petition for Rehearing filed on September 2, 2014 at Step #65 and App. at B).

One of the very purposes of a Petition for Rehearing under CR 76.32 is when the Court of Appeals has misconceived the issues presented to it for decision or when the parties wish to point out inaccuracies of fact. See CR 76.32(b) and (c). The Court of Appeals misconceived that Platte River had no abiding interest in the outcome of the appeal and determined incorrectly that the indemnity provision stating that only Platte River could pursue an appeal foreclosed Platte River and Furlong from reaching an agreement separate than what the scant record in the trial court revealed. It is clear from

the record in the lower court that in relation to the calling of the bonds, Platte River's and Furlong's interests were aligned. Platte River did not believe the bonds should have been called and neither did Furlong. (ROA at 283-297).

In the trial court, Furlong and Stacy commenced the proceedings against the parties by filing the declaration of rights action and unjust enrichment. No party in the trial court raised the issue of standing as a defense to this action. In Harrison v. Leach 323 S.W.3d 702 (Ky. 2010) the Court analyzed whether the Court of Appeals could decide a case based on standing when that defense was not raised by the parties. The Supreme Court concluded that the defense of standing is waived unless it is timely pled. See Id. at 708. In Harrison, the Court clearly found that the Court of Appeals erred when it interjected standing into an appeal when the benefitting party did not raise the defense in the court below. As stated above, the Court of Appeals did not address the gravamen of the appeal (i.e. the bonding issue) because of standing in the case at bar. It also gave short service to Furlong's and Stacy's claim for unjust enrichment because it also determined that this claim was contingent upon Platte River's interest in the appeal. The Court of Appeals erred in this aspect of their Opinion.

Moreover, especially in respect to the unjust enrichment claim, Furlong and Stacy do have standing to assert their claims. This is true, even if the Court of Appeals was correct in its assumption about the litigation agreement between Platte River and Furlong and Stacy. Standing is defined as a "require[ment] that a party have a judicially recognizable interest in the subject matter of the suit." Id. at 705. At the end of the day, if the bonds are ever paid out to any other party, the final responsibility for the repayment of the subject bonds falls into Furlong and Stacy's lap. If it were not for the indemnity

provision giving power to Platte River to decide whether to defend, settle or appeal the case identified by the Court of Appeals, it would be without question that Furlong and Stacy had a definite interest in the outcome of the case. However, it has already been pointed out that the Court of Appeals' assumption about the agreement was incorrect. It should also be noted that the indemnification agreement also states that Furlong and Stacy "shall and will at all times defend, when requested by the Surety to do so, and shall and will indemnify, and keep indemnified, and hold and save harmless the Surety against all claims, demands, claims, loss, costs, damages, expenses and fees, including attorney fees..." (ROA at 42 at paragraph 2) The provision parceled out by majority Opinion does not take into account that the placing of required cash or collateral is only a provision that would allow Furlong and Stacy to control litigation, but has nothing to do with the Parties' decision on how the case should be prosecuted once Platte River determined that the case should be litigated.

In relation to the unjust enrichment claims because of the Bank's breach of the mutual release between the parties, it is extremely questionable how this common law claim can be contingent upon the indemnity agreement between Platte River and Furlong and Stacy. The provision relied upon by the majority to conclude that the unjust enrichment claim is contingent upon Platte River's interest in the appeal is illogical. The essence of the claim for unjust enrichment is that the Bank's actions induced the bonds to be called by the Commission in violation of the written release between the parties. (ROA at 10 and 11 and Complaint at Counts I and II). The indemnity provision in paragraph 10 of the indemnity agreement states that Platte River "shall have the exclusive right for itself and for the Undersigned [Furlong and Stacy] to decide and determine

whether any claim, demand, suit or judgment **upon the bond(s)** shall be paid, settled, defended or appealed, and its determination shall be final" (ROA at 21 emphasis added). Whether the bonds would be eventually paid out by Platte River or fought over until the bitter end has little if nothing to do with the Bank releasing Furlong and Stacy (and its sureties on the bonds) and then turning around and asking that the bond money be placed in escrow for its benefit. Therefore, the majority Opinion is in error and should be reversed by the Supreme Court.

IV. THE PLAINTIFF'S 60.02 MOTION SHOULD HAVE BEEN GRANTED

This argument is preserved for review by the Motion for Relief from the Summary Judgment and the subsequent denial of the Motion by the trial court. (SROA at 3 and 29). The standard of review on whether a trial court should have granted relief pursuant to a CR 60.02 Motion is "abuse of discretion". See Bethlehem Minerals v. Church and Mullins Corp. 887 S.W.2d 237 (Ky. 1994). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. See Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Again, in affirming the trial court's denial of the 60.02 Motion, the Court of Appeals stated that the 60.02 Motion was filed by Stacy and Furlong alone and not Platte River. The majority determined that the Motion was not well founded at its inception because the indemnity provision relied upon to decide the case. After making this declaration, the majority then determined that the essence of the 60.02 Motion was not material and would not have changed the outcome of the proceeding. (Opinion at 13-14). However, if the Court of Appeals would have addressed the gravamen of whether the

bonds had matured in the first place, then the materiality of the newly produced evidence becomes apparent.

As argued in Section I of this Brief, bonds that are required by a regulation must be read in conjunction with the purpose of the regulation. See Westchester Fire Insurance Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla 2010). The question in the case at bar is when did these bonds mature so that they could be enforced by the Commission. Should they be enforced because Furlong and Stacy transferred the property to third party that was not the Bank? Alternatively, should the new developer be required to place a new bond after taking over the subdivision before any homes were built?

The affidavit of David Thornton and the evidence presented in that affidavit went directly to the heart of these questions. Mr. Thornton was the insurance professional that brokered the three performance bonds in issue. He presented evidence pertaining to the understanding of the parties in relation to the bonding issue. Both the Bank and Commission initially agreed that the bonds would need to be replaced with other surety because the property had been transferred by Furlong and Stacy. A representative from the Commission agreed with Mr. Thornton that new surety was needed to replace the Platte River bonds. Moreover, the loan officer for the bank also agreed that new security would have to be placed over the subdivision and was assured that the Bank would issue a letter of credit. However, in a subsequent conversation with the loan officer, Mr. Thornton advised that the Bank planned to encourage the Commission to call the bonds. (SROA at 10-12).

The regulation for the Georgetown Planning and Zoning Commission specifically states "the developer must file with the Planning Commission proof of bond or a letter of credit upon a bank or other appropriate financial institution conditioned to secure the construction of said improvements." (ROA at 315; Article VI 600-B). Both the statutory scheme and the subject regulations strictly require a bond from any developer. In this situation, the new entity in control of the subdivision was in the position of selling lots for profit, which would both lead to and pay for the finishing work covered by the bonds after construction of 80% of the homes. This new entity, whether it be the Bank, developer or whatever would be the entity getting the benefit without having to pay for its own bonds, do the finishing work or reimburse the county after it sold 72 lots for profit and homes were constructed on the lots.

Kentucky law has established requirements that a moving party must show in order get relief under CR 60.02(b): (1) the evidence, if introduced, would probably result in a different outcome; (2) the newly discovered evidence is material; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the evidence was discovered after entry of the judgment; (5) the moving party was diligent in discovering the new evidence. See Hopkins v. Ratliff, 957 S.W.2d 300, 301-2 (Ky. App. 1997).

The trial court relied on the four corners of the deed and bonds in question when it granted summary judgment. However, it failed to mention in its ruling about whether the bonds should have been read in conjunction with the subdivision regulations or industry practice that required the bonds in the first place. The trial court did not address the argument about whether the transfer to a new entity required the bonds to be replaced, even though it did recognize that the work covered by the bonds was not needed at the

time of summary judgment. (ROA at 367 and Summary Judgment at p.3). The deed in question did say that the Bank was not releasing Furlong's and Stacy's obligation to third parties, but the question in the case at bar was not whether Furlong and Stacy were released from obligations to third parties, but whether there was any obligation in the first place under the bonds. The deed did not answer this question. The evidence provided by David Thornton went to the parties' understanding of the bonds in conjunction with the underlying subdivision regulations and industry practice. The Kentucky Supreme Court held that "[t]o ascertain what the parties meant by what they wrote, we must try to place ourselves in their shoes. We then, psychologically, substitute ourselves for the contracting parties and take into effect the social and economic conditions of the times and of the parties, the usual practice of the trade, the familiarity of the parties with the subject matter, and the education and business advantages of the parties." Ward v. Harding, 860 S.W.2d 280, 287 (Ky. 1993). Simply put, there is more to interpreting the bonds in question than simply the bonds themselves. They must be read with the extrinsic evidence of the underlying subdivision regulations and the usual practice of the trade in the area. Mr. Thornton's understanding and his numerous conversations with the Bank and the Commission was definitely evidence material to this issue.

Secondly, the evidence was material to the unjust enrichment claim. To prevail under a theory of unjust enrichment, a party must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. See Jones v. Sparks, 297 SW.3d 73, 78 (Ky. App. 2009). Therefore, we have benefit conferred upon the Bank and its wholly owned company, which is that it is now the

owner/developer of a development ready for lots to be sold for profit, but it does not have to secure the finishing touches after it sells 80% of the lots and other contractors build the homes on the lots. Instead, the Bank and its company are able to reap profits from the selling of the lots without having to worry about placing its own bond to secure the finishing touches for the City of Georgetown. The Bank even wanted to be reimbursed for the finishing work. Finally, it is also inequitable for the Bank to encourage the calling of a premature bond in order to avoid its own duty to secure the finishing work as the new developer. The Affidavit of Thornton places into evidence that the agent for the Bank was initially going to re-bond the property in accordance with everyone's understanding about EGT being the new developer and the subdivision regulations. Instead, the Bank chose to exploit the situation and make a money-grab for the bond amount and premium costs. This is a windfall for the Bank at the expense of Furlong and Stacy.

The final argument that the Appellants make in relation to their CR 60.02 Motion is that this new evidence, in the very least, should have convinced the trial court to set aside the Summary Judgment and to allow discovery. The argument about discovery is set forth below in more detail. However, in relation to the 60.02 motion, this evidence should have changed the trial court's mind when it found the arguments of Platte River, Furlong and Stacy had "nothing to do with the well-settle facts of this case in the Plaintiffs gave up their rights in the property to EGT for a release by the bank on their obligation under the two notes and no more. No discovery will change these facts." (ROA at 367-8 and Summary Judgment and p.3-4). In Conley v. Hall, 395 S.W.2d 575, 580 (Ky. 1965), the Court held that "in the exercise of sound judgment [a trial court

should] grant a continuance or deny the motion for summary judgment where the opposing party is proceeding in good faith and his claim or defense has some merit." Id. At the very least, the newly discovered evidence should have resulted in the opportunity to perform discovery before the entry of the Summary Judgment. Therefore, both the denial of the trial court of the CR 60.02 relief and Court of Appeals affirmation of the trial court's denial should be reversed.

V. DISCOVERY SHOULD HAVE BEEN ALLOWED TO PROCEED BEFORE THE ENTRY OF SUMMARY JUDGMENT

This argument was preserved for review by the Response of Platte River to the other Defendants' Combined Motion for Protective Order requesting that no written discovery be performed until the trial court ruled on the pending Motions for Summary Judgment and the Plaintiffs' Response to the Defendants' Motions for Summary Judgment. (ROA at 267, 335, 351, 365). It is also preserved by the Plaintiffs request for a pretrial conference to establish discovery deadlines. (ROA at 85). The standard of review for discovery issues is "abuse of discretion". Manus, Inc. v. Terry Maxedon Hauling, Inc., 191 S.W.3d 4 (Ky.App. 2006).

The legal test as to whether a trial court's decision to grant a Motion for Protective Order is whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. See Id. As stated above, the trial court granted the Defendants' Motion for Protective Order to stay discovery while it considered the pending Motions for Summary Judgment. In so doing, the Plaintiffs were unfairly restricted from pursuing evidence to prove the theories of their case, which was not simply a "four-corners" case.

As stated above in the Statement of Facts, Platte River had served written discovery requests to the Bank, EGT and the Commission. (ROA at 257-266). In relation to the Bank and EGT, Platte River wished to discover what the Bank had done to market the subdivision or otherwise sell the subdivision. It also wanted to know what offers had been made in relation to the property. This would have shed light on the nature of EGT and then also to the nature of EKT, the subsequent company and owner of the subdivision. Was EGT simply a holding company for the bank or was it more? Was EKT a new developer required to place its own bonds? The written discovery requests were also designed to find out what plans the Bank or EGT had for the subdivision and also the bank's understanding of where the subdivision was in terms of development. Platte River also wished to discover communications between the Commission and the Bank relating to the subdivision, including whether the Bank or EGT had applied to the Commission as the developer. All this development of facts would have shed light on the bonding arguments set forth by the Appellants and Platte River.

In relation to the Commission, the written discover was designed to get all relevant information and communication from entities other than Furlong concerning applications for development of the property. It was also designed to further develop and understand how far construction had advanced in the subdivision. The written discovery also should have shed light on more of the Bank's encouragement to call the bonds besides the letter from their attorney that is in the record. (ROA at 37). It also would have required the Commission to produce the entire regulations concerning the subdivision besides the piecemeal regulations that were attached to prospective parties' motions or responses thereto. All of these requests were designed to flesh out the legal

arguments concerning the maturity conditions of the bonds and determine whether the bonds were extinguished by transfer to a new developer.

The Court of Appeals did not address the discovery argument of the Appellants because it assumed or found that neither Furlong or Stacy was entitled to pursue an appeal and "[c]onsequently, we make no further comment upon the issue surrounding Platte River discovery requests or the contention that its obligations were contingent upon substantial completion of the development by Furlong" (Opinion at 10-11). As another matter related to this standing issue, the only time that the Bank, Commission or EGT made mention of "standing" was in relation to Platte River's discovery requests while the case was on appeal. As argued in the Bank's and EGT's Brief that Furlong and Stacy lacked a substantial interest in the motions for protective order because they did not file the discovery requests. However, when taking a closer look at what happened in the trial court, it is clear that Summary Judgment was granted improvidently without discovery regardless of whether it was Platte River or Furlong that made the discovery requests.

The last responsive pleadings were filed in the record on April 8, 2011. (ROA at 82-85). The Requests for Production of Documents was served upon the Bank, EGT and the Commission on June 16, 2011. (ROA at 260 and 266). Furlong and Stacy's former attorney filed a motion for a pretrial conference on June 21, 2011. (ROA at 85). The Bank and EGT filed its motion for Summary Judgment on June 29, 2011. (ROA at 86-87). On August 2, 2011, the trial court entered an Order that the pretrial conference be passed generally and granted the protective order until it heard the Summary Judgment motions days later. However, in the same Order, the trial court granted leave for the Plaintiffs to amend their Complaint to join a new defendant, EKT. (ROA at 351). The

hearing on the Motions for Summary Judgment was held on August 4, 2011, and the Court entered Summary Judgment on August 29, 2011. All this took place in a period of about six months from the filing of the original Complaint. Furthermore, and most notably, Furlong and Stacy were not given the opportunity to follow through on the Order granting leave to amend their Complaint to join EKT Properties before the trial court prematurely terminated the case by Summary Judgment. If concluding a case by Summary Judgment before the final party is brought before the trial court is not premature, it is hard to imagine what would be.

Secondly in relation to whether Furlong and Stacy had a substantial interest in Platte River's Requests being responded to by the other defendants, the answer is in the affirmative. The Defendant's responses to those requests would have been most helpful in developing the record. It also would have been a waste of time for Furlong and Stacy to serve similar requests when the party that it had an agreement with to keep costs lower had already done so. However, regardless of this, Furlong and Stacy's former counsel filed a Response to Motions for Summary Judgment on August 1, 2011 (ROA at 335-339). It is clear from the response that EGT had sold its interest to EKT on September 29, 2008 for $4,000,000.00. (ROA at 335 and 340-44). Furthermore, there was an allegation that the Bank was also trying to sell the subdivision by silent auction. (ROA at 336). The Responses to Platte River's requests would have provided evidence of what was happening with the subdivision and revealed whether a new developer had taken over. Much of Furlong's response to the Motions for Summary Judgment was a request that the trial court hold off on granting Summary Judgment until the Plaintiffs had a real opportunity to perform discovery. This response should have been well-taken because

the case had only been going on since February of 2011 and the final Party, EKT, had yet to even be brought before the Court, even though the trial court had granted leave for the Plaintiffs to join EKT!

The Kentucky Supreme Court held "a motion for summary judgment is not a trick device for premature termination to litigation." Conley v. Hall, 395 S.W.2d 575, 580 (Ky. 1965). In Conley, the Supreme Court held that "in the exercise of sound judgment [a trial court should] grant a continuance or deny the motion for summary judgment where the opposing party is proceeding in good faith and his claim or defense has some merit." Id. at 581 (citing Moore Federal Practice, Vol. 6, Section 56.15(6) at 2157). In Pendleton Bros. Vending v. Comm. Finance & Administration, 758 S.W.2d 24 (Ky. 1988), the Supreme Court held that a party need not be prepared to prove their case at the time of filing the suit and are entitled to discovery before summary judgment is granted. "A summary judgment is only proper after a party has been given ample opportunity to complete discovery, and then fails to offer controverting evidence." Id. at 29. A party simply should be given an opportunity to perform discovery before Summary Judgment be granted. See Hartford Insurance Group v. Citizens Fidelity Bank & Trust, 579 S.W.2d 628 (Ky. 1979). This opportunity (especially "ample" opportunity) was not given to the Plaintiffs in the case at bar, and the trial court's Summary Judgment should be reversed on this point alone.

The Bank and EGT argued in their Brief that an affidavit from either Furlong or Stacy was necessary to support their request for additional discovery. They initially cite to Hayes v. Rodgers, 447 S.W.2d 697, 601 (Ky. 1969), but the lament of the non-moving party in that case was that the case should proceed to trial where further evidence would

be gathered instead of being cut off by Summary Judgment. Furthermore, the parties did file affidavits in that case after the case had been pending for a year and a half. See Id. at 599. Neal v. Walker, 426 S.W.2d 476 (Ky. 1968) is also cited in support of the requirement of an affidavit. However, it was noted that there was no request for a continuance of the Summary Judgment hearing to get additional evidence. See Id. at 480. In the case at bar, the very heart of Furlong's and Stacy's response was that Summary Judgment should not be granted before they were allowed to do some discovery. Furthermore, the Civil Rule 56.03 does not require affidavits because it clearly states "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, **if any**, show that there is no genuine issue as to any material fact..." CR 56.03. It is the entire record that the trial court must look to before granting Summary Judgment. As argued in the Section I above, there was enough of a question of fact concerning the transfer of the subdivision to a new developer and whether the bonds had actually matured to preclude Summary Judgment.

The Bank and EGT also cite to the recent case of Henninger v. Brewster 357 S.W.3d 920 (Ky App. 2012) to support the trial court's premature Summary Judgment. However, this case is not on point. In Henninger the parties actually had an opportunity to exchange written discovery before the filing of Motions for Summary Judgment. It also appears that some depositions were taken. There was then a full year after the hearing before the trial court granted summary judgment. It was specifically noted that the losing party had an additional year or more to discover evidence and did not do so. Id. at 929-30. As stated by the Court "the Henningers had just shy of two years to engage

in the necessary discovery, yet failed to do so; we find this time to be adequate under the less-than-complex and relatively straightforward facts of this case." Id. In the case at bar, the trial granted Summary Judgment even before the final defendant had been brought into the case and only six months after the Complaint had been filed. Moreover, the case at bar is more complex than just simply looking at the bonds and deed in question because the bonds needed to be interpreted in light of the underlying regulations and industry practices of the area. There was also clearly a question concerning the amount of work that had been performed by Furlong already and whether a new developer had taken over the Enclave.

In Suter v. Mazyck 226 S.W.3d 837 (Ky. App. 2007), the Court of Appeals reversed the trial court's summary judgment because the parties were not given ample opportunity to perform discovery. The Court of Appeals held that for "summary judgment to be properly granted, the party opposing the motion must have been given adequate opportunity to discover the relevant facts. Only if that opportunity was given do we reach the issue of whether there were any material issues of fact precluding summary judgment." Id. at 842. The Court of Appeals further explained "[w]hether a summary judgment was prematurely granted must be determined within the context of the individual case. In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties." Id. In the case at bar, the case dealt with a multi-million dollar subdivision that was divided into three units. It also dealt with novel issues of law and rather complex network of subdivision regulations. At

least in the Suter case, the parties had an opportunity to exchange written interrogatories and requests for production of documents. Even so, the Suter case was sent back to the trial court with direction to enter a pretrial order setting the time limits for discovery. See Id. at 844.

Furlong's and Stacy's trial counsel had this is mind when he requested a pretrial conference (ROA at 85 and video of hearing on July 7, 2011, at 11:30) before the defendants filed their Motions for Summary Judgment eight days later. It is usually at a pretrial conference that deadlines are established by a trial court. However, the pretrial conference was passed by the Court at the same time it entered the protective order precluding the answering of Platte River's written discovery requests. The lack of a reasonable opportunity to perform discovery is so apparent that, in accordance with Suter, this case should be reversed before even reaching the questions presented in the Motions for Summary Judgment.

CONCLUSION

This case should be reversed upon the last point because Furlong and Stacy were denied the opportunity to develop their case before it was concluded by Summary Judgment. This was simply not a case that could be decided solely upon the four corners of the deed or the bonds. Moreover, from a common sense perspective, there was enough of a question of fact in the record concerning whether the bonds had even matured to the point that they could be encouraged to be called by the Bank and then subsequently demanded by the Commission. The whole purpose of the bonds was to cover work after the developer had garnered profits from the sale of lots and 72 separate construction projects had been completed. As a matter of law, these bonds had not matured because

the regulatory intent and intent of the parties was that the Scott County/Georgetown would not have streets dedicated to it that were torn up by heavy construction machines and materials after the developer sold lots. This is also true with not having sidewalks being crossed and damaged. It also was to cover the storm drain clean out after silt, dirt and other debris from 72 construction sites had accumulated. None of this had occurred. Finally, Furlong and Stacy should be allowed to pursue the unjust enrichment claim against the Bank for its action to encourage the calling of the bonds for its own benefit after specifically releasing Furlong and Stacy. As stated by the dissent in the Court of Appeals Opinion, the "construction of the mutual release is essential to" the unjust enrichment claim. (Opinion at p.14-15). Therefore, the Appellants respectfully request that the Court of Appeals Opinion affirming the trial court be reversed and the case remanded to the trial court for further proceeding consistent with the Supreme Court's Opinion.

Respectfully submitted,

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